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THE RECOVERY OF EXEMPLARY DAMAGES FROM JOINT TORTFEASORS.

The joining of tortfeasors in a single suit is to be viewed from many angles. There is, in the first place, the question we lately discussed in 79 Cent. L. J. 4, of there being an inconsistency in the verdict by releasing the employe and holding the employer. As to this nothing further will be here said, except to recall what we said as to the necessity of practical judgment in joining employer and employe in one suit.

This last thought again presents itself as to another phase, so far as the amount of recovery is concerned, from reading the case of Dunshee v. Standard Oil Co., 146 N. W. 830, decided by Iowa Supreme Court, the case being on its second appeal and judgment in plaintiff's favor being affirmed. This case is one of the noted cases holding as it does the defendant liable, in actual and exemplary damages, for resorting to methods to destroy the business of a competitor, and actually destroying the same. It, as decided on the former appeal, has been called a landmark case in American jurisprudence.

The thought we speak of regards the advisability of joining several tortfeasors as defendants where exemplary damages are sought under the rule laid down in Moore v. Duke, 84 Vt. 401, 80 Atl. 94, distinguished in the Dunshee case.

That rule declares that: "Since exemplary damages are predicated upon the animus of the one against whom they are claimed, it may happen, when two or more are defendants, that some are liable for exemplary damages and others only for compensatory. Some may be acting in good faith, while other * * * maliciously. In such cases, while all are liable for the full amount of the actual injury, which the plaintiff has suffered from the joint tort, * * * exemplary damages are to be assessed according to the guilt of the most innocent of the defendants. And if any of those was acting in good faith, and so not liable to punitive damages, none can be awarded in the suit."

For this principle the Vermont court cites Fohrman Con. Trac. Co., 63 N. J. L. 391, 43 Atl. 892; Haner v. Railway Co., 64 N. J. L. 312, 45 Atl. 593, though as a principle it seems very clear, if only one verdict is to be returned against all, and contribution worked out upon that as a basis in favor of whosoever pays the judgment.

Just here it will occur to any pleader to be wary so far as any defendant acting with good faith is concerned or whose guilt is less than others. Either he may not join him in the first place or he may exercise his privilege of dismissing as to him when all of the evidence is in.

And, if he does the latter, he does it so he may enhance his recovery against the others, and when we consider that he may do this without leave or license of the others it does seem that their rights are a sort of football for the plaintiff to kick about at his own sweet will.

But how much better is it for procedure to allow that there may be one verdict as to compensatory damages, and several verdicts as to exemplary damages, graduating recovery against each as his animus and conduct may suggest? Of course, there might arise some confusion about contribution, but even this could be arranged and the scheme not be too complicated for the mind of the ordinary juror.

At all events, as the matter stands, plaintiff has to elect between wrongdoers. Had the others been joined the verdict would not, under the rule we have instanced, have been so large. This is

quite a serious matter, when, as is often the case, the exemplary damages exceed the actual and to award according to the guilt of each is right according to the principle of no contribution between joint tortfeasors.

The distinction applied in the Dunshee case is that: "When defendants are charged as joint tortfeasors, by reason of a conspiracy or common unlawful purpose, * * * a different rule must govern. * * * If several persons enter into an unlawful enterprise or a conspiracy to commit an unlawful act, each one concerned in and participating in it will be chargeable with the malice which prompted it. * * * We think there is a clear distinction between the rule thus stated and that announced in Moore v. Duke, *supra*, in that, where a conspiracy or common unlawful purpose is shown, there can be as among the participants no degrees of liability, but all who are concerned in the unlawful purpose are liable for its consequences."

Practically a jury could not be expected to follow all this refinement of reasoning in instructions, but the principle as a principle seems well-founded in logic, except that exemplary damages are not always predicated purely upon the unlawful purpose but also upon the way it is carried out. If brutally carried out, against the will of some of the participants, it is holding all of them to a very severe rule to make them liable for one's brutality. If, however, this is in furtherance of the unlawful purpose, the law should not be anxious about those who have placed themselves in a bad predicament.

It is interesting also to note of the Dunshee case that an assignee was the plaintiff and it was urged he had no right to recover exemplary damages as they "are peculiarly the right of the one against whom the wrong was committed and cannot be assigned." The court held however, that under the Iowa statute action for tort survives, and no distinction is drawn between recovery for compensatory and for punitive damages.

We do not see, however, that punitive damages are such as claimed, but on the contrary, they do not pertain to "the right of one against whom a wrong is committed." They are given as a warning or as a punishment, and a particular recipient has less of personal right to them than to compensatory damages. Courts are very particular in saying judges shall not instruct juries that they *must*, but only that they *may*, award them.

NOTES OF IMPORTANT DECISIONS

APPEAL AND ERROR—APPLYING STATE RULES OF PROCEDURE TO CASE DEPENDING ON FEDERAL LAW.—The rule in Wisconsin is that no case is to be reversed on the ground of misdirection of the jury or the improper admission of evidence, unless in the opinion of the court, after an examination of the entire action or proceeding it shall appear that the error complained of affected the substantial rights of the party seeking a reversal or a setting aside of the judgment or to secure a new trial. This rule was applied to an action under the Federal Employers' Liability Act. Sweet v. Chicago & N. W. Ry. Co., 147 N. W. 1054.

The court said: "Where an act of Congress commits to the state court the duty of trying cases arising thereunder such cases may be tried according to the state rules of procedure."

In 79 Cent. L. J. 57, reference was made to a pronouncement by a Federal District Court to the effect that the Seventh Amendment did not apply to actions under Federal law tried in state courts, and this ruling is along the same line, though it might be claimed precisely the same question is not involved.

As seeming to support the view that procedure of the Federal Courts administering state law is governed by the Seventh Amendment, Scott v. Neely, 140 U. S. 106, is cited where it was held that a new equitable right under state law would not be granted, where it denied the right of trial by jury. That lends some support to the cases we have referred to, and at all events it is a wholesome ruling, notwithstanding it may seem to mean that an act of Congress may have a different application in one state from what it has in another—a

very subtle distinction between adjective and substantive law. See 75 Cent. L. J. 330, under title: Limitations on Federal Courts in Administering State Law.

PROCESS—SERVICE ON NON-RESIDENT UNDER MISNOMER.—A similarity as to sufficiency of process in idem sonans and resemblance in the spelling of a name, is declared in a late decision by United States Supreme Court, Grannis v. Ordean, 34 Sup. Ct. 779.

In this case service was made under a statute providing for mailing to a non-resident a copy of the summons in a case and also by publication. The defendant in the case was named "Albert Geilfuss" and the summons and the publication read "Albert Guilfuss." The suit was for partition of land. The trial court held that the two names were not idem sonans and the service was bad. The State Supreme Court reversed this holding and the case was taken by appeal to the Federal Supreme Court under the due process of law clause of the Constitution and the latter ruling affirmed.

The State Supreme Court said that while "Geilfuss" and "Guilfuss" are not idem sonans, "the true test is not whether the names sound the same to the ear when pronounced, but whether they look substantially the same in print."

The United States Supreme Court, speaking by Mr. Justice Whitney, said: "Were we to theorize, we might say that while each of these tests is helpful, neither is altogether acceptable if perfect accuracy were the aim. * * * The underlying question is a practical one—whether notwithstanding the misnomer, the summons as published and mailed, being otherwise unexceptionable, constitutes a substantial compliance with the Minnesota statute and sufficient constructive notice to the party concerned. In determining this, we need not confine ourselves to the test of idem sonans, nor to the appearance of the name in print, but may employ both of these, with such additional tests as may be available in view of what is disclosed by the record. One such additional test, we think, is whether when two letters reached the postoffice in Milwaukee, one addressed 'Albert Guilfuss, Assignee,' the other addressed 'Albert B. Guilfuss,' they or either of them would, in reasonable probability, be delivered to Albert B. Geilfuss, then a resident of that city. Another is whether, assuming that the summons as so mailed, was published in Duluth, and containing the misspelled names or either of them, had come to the eye of the veritable Albert B. Geilfuss, or of any person knowing him by that name, and sufficiently interested in him to acquaint him with the contents, if apprised that it was intended for him, the summons as a whole would probably have conveyed notice that Albert B. Geilfuss was the person intended to be summoned. Both of these questions are, we think, to be answered in the affirmative. In view of the well known skill of postal officials and employes in making proper delivery of letters defectively addressed, we think the presumption is clear and strong that the letters would reach—indeed, that they did reach—the true Albert B. Geilfuss in Milwaukee."

There is an abundance of circumlocution about this ruling and its general effect, it seems to us, is to pronounce as sufficient almost any attempt at a name in service of a non-resident, and to show that mailing to a non-resident is valuable in the determination of the question of service or no service.

NEGLIGENCE—INJURY TO PASSENGER FROM EMERGENCY BRAKE BEING APPLIED.—New York Court of Appeals recognizes that a carrier has the right to bring a passenger train to a violent stop in order to prevent running down a pedestrian on the track, but, if an engineer has been at fault in not discovering his peril sooner, the carrier is not excused. Dorr v. Lehigh Valley R. Co., 105 N. E. 652.

In this case an old man was moving toward the tracks and attracted the atention of the fireman by the slowness of his gait, apparently oblivious of an approaching train, the train going at about 10 miles an hour. When the train neared the crossing he shouted to the engineer to stop and the emergency brake was promptly and vigorously applied, but not in time to avoid killing the old man. Plaintiff, a passenger on the train, violently was thrown against the seat in front of him and suffered injuries.

The lower court granted non-suit and this the appellate division reversed. Court of Appeals reverses the trial court, saying: "The facts certainly warrant the inference that prompt action on the part of the fireman, such as the situation obviously called for, would have resulted in checking the onward movement of the train without any such shock as actually occurred, and perhaps in time to have saved the old man's life. Upon the evidence in this record it might well be inferred that the old man's death was due in part to his own carelessness; but his contributory negligence would not affect the plaintiff's right of action as a passenger to recover on account of the defendant's negligence so far as it resulted in injury to him."

This case is interesting as going into a consideration of all the facts to ascertain the proximate cause of an injury. While it was right to apply the emergency brake, yet as its application was rendered necessary by defendant's negligence, it is held liable for the consequences.

DYING DECLARATIONS — INADMISSIBLE WHERE EXHIBITING A SPIRIT OF REVENGE.—In Reeves v. State, 64 So. 836, decided by Mississippi Supreme Court, the facts show that deceased knowing he was about to die, said: "Barney Reeves shot me," and "Barney have murdered me, and I hope the people won't let Barney walk about and not do nothing to him after he have murdered me like he have." There was a motion to exclude the declaration, because "deceased was in such frame of mind as to destroy its trustworthiness; that he was dominated by a sense of hatred and revenge against the defendant." The motion was overruled by the trial court.

The Supreme Court said: "The only justification for the admission of dying declarations is the presumption that the near approach of death produces a state of mind in which the utterances of the dying person are to be taken as free from all ordinary motives to misstate. Among such motives and among the most powerful thereof are malice and the desire for revenge, and when it appears that the declaration is tainted therewith all guaranty of its trustworthiness is removed and it should not be admitted. This is true irrespective of the declarant's belief or not in a punishment in a future state."

The court then alludes to dying declarations being an exception to the rule excluding hearsay testimony and their being rejected when the supposed guarantees of their trustworthiness have been overthrown.

We greatly doubt whether a declaration such as this was should be declared to destroy its trustworthiness. At most it should have been a matter of consideration by the jury. The malice of a witness only goes to his credit, and there remained in this case the same solemnity of death to impart presumption of truth to what was said. Deceased could have had no malice except against the slayer, and whether he was such was the point about which the jury was concerned.

There really was no great violence of speech in what the declarant said. It was not entirely inconsistent with his desire to see justice meted out to his slayer and that is all that any dying declaration is made to accomplish.

MEANING OF THE PHRASE "ARISING OUT OF AND IN THE COURSE OF HIS EMPLOYMENT" IN AMERICAN WORKMEN'S COMPENSATION ACTS.

I have decided to discuss a subject of great importance to the lawyer of the present and the future, the interpretation of some doubtful points in the Workmen's Compensation Acts, which have lately been so widely adopted in our American states. To show the present importance of the subject I will say that up to January 1st, 1914, twenty-three states had adopted laws of this character. This state's (N. Y.) last Legislature, following an amendment to the Constitution by popular vote in November, 1913, readopted the measure, and there is no doubt from the present agitation that every industrial state will have yielded to the popular demand for such a law within the next year or two.

The development of Workmen's Compensation laws began in Europe a quarter of a century ago. Germany's industrial organization has been noted for years for this reform. Nearly every European country has followed Germany's lead in this matter. In the United States New York was the first to see the justness of statutes doing away with the old common law rules of pecuniary payments to men injured in the trades, and passed the Wainwright act. She was followed by Massachusetts and Washington, but the courts of this state, after much discussion, decided the New York law was unconstitutional, thus placing the state among the laggards. Massachusetts and Washington, however, upheld their similar acts on the grounds of police power, and so have furnished decisions for the other states to follow. The highest court of Washington, in the noted case of Davis-Smith Co. v. Clausen, 117 Pac. 1101 (1911) expressly criticised the New York Court of Appeals, which latter based its decision on that provision of the state constitution similar to the fourteenth amendment of the federal constitution providing that property

may not be taken without due process of law.

Just what is this act that has been received so favorably in all industrial communities? Briefly, it is a provision for an amelioration of the loss suffered by an employee when he is forced, through injury, to suspend or alter his labor and a means of furnishing a workman's widow with a small income if her husband, through the vicissitudes of his occupation, is killed. Under the old common law, an employer was liable for injuries sustained by his employees but with the three hedging rules of assumption of risk, contributory negligence, and the fellow servant doctrine. As a consequence of these rules, payment of any substantial sum to the workman or his heirs seldom followed death or disability, and whatever was recovered went largely to pay the expenses of trial. It is of these conditions that the new laws are remedial. Under them, regardless of his negligence, the employer must pay for accident, either directly by payment to a state fund, or by employer's insurance. The text of the key paragraph of the new New York act, which may be taken in this regard as typical, is as follows: "The compensation provided for by this act must be paid by the employer for the disability or death of an employee, due to accident sustained by the employee *arising out of and in the course of his employment* without regard to fault as a cause—"

It is the meaning and interpretation of the phrase "arising out of and in the course of his employment" that is the nut to crack. Must the workman be actually injured by something connected with what he is doing while he is at the business place of his master? Or will he receive compensation if he hurts himself in pulling on his trousers preparatory to going to work? Or will some middle ground be adopted? This question, because of the novelty of the acts, has only been decided in America within the last three years, though there are a number of English cases in point.

As the compensation laws in the United States are almost identical with the British Act of 1906 (6 Edw. VII c. 58) interpretations of this point by the English courts may be considered with profit as a starting point from which our courts proceeded. The case of Fitzgerald v. Clark & Co., (1908) 2 K. B. 798, gave this elucidation: "'Arising out of' points to the origin or cause of the action, and, 'in the course of' to the place and circumstances under which the accident takes place and the time when it occurred." (See also Moore v. Manchester Liners, Ltd., 1910, A. C., 498, 500). As there are a very limited number of decisions on this point in this country, I shall group them, for convenience, by states.

Massachusetts. As a case following closely the English courts in re Employer's Liability Assurance Association, 102 N. E. 697, (Mass., 1913), is leading. There an employee was engaged at work on a dock in Boston when a fellow employee, "in an intoxicated frenzy of passion," kicked him, causing death. The employers were held liable under the Massachusetts statute. The court said: "It is sufficient to say that an injury is received 'in the course of' the employment when it comes while the workman is doing the duty which he is employed to perform. It arises 'out of' the employment, when there is a casual connection between the conditions under which the work is required to be performed and the resulting injury. Thus if the injury, followed as a natural incident of the work and could have been contemplated by a reasonable person familiar with the whole situation, as a result of the exposure occasioned by the nature of the employment, then it arises 'out of' the employment. It must have followed from the work as a natural consequence."

In a still later case in the same jurisdiction (Milliken v. A. Towle & Co., 103 N. E. 898 [1914], the employee was a wagon driver for the defendant. Five years before he had suffered an injury to his head and at times became unable to take care of himself. On the occasion of the injury he started from the firm's office to its barns in Charlestown to put away his team. During

the journey his peculiar malady affected him and he lost his way. The next morning he was found immersed to his neck in a swamp; death resulted from the exposure. In regard to this state of facts the Supreme Judicial Court said: "The fact that Milliken would not have met his death but for the horse and wagon, and his effort to get them to the stable, goes no farther than to show that the personal injury suffered by Milliken, was 'in the course of his employment.' But the injury must 'arise out of' as well as occur in the 'course of' the employment. This means that the nature and conditions of the employment must be such that the injury, which, in fact, happened, was one likely to happen to an employee in that employment. There must be a casual connection between the employment and the injury." So the court held for the defendant on the theory that ordinarily a teamster would not be in danger of losing his way and falling into a swamp. The case seems sound on principle and will no doubt be used as a mark beyond which recovery under the Workmen's Compensation Acts cannot be had.

The very latest Massachusetts case in the books is Johnson v. London Guarantee & Accident Co., 104 N. E. 735 (April, 1914) where it was held "without cause for doubt" that physical incapacity due to lead poisoning or plumbism resulting from plaintiff's employment as a lead grinder was within the clause. In re Hurle, 104 N. E. 336, holds that blindness caused by inhaling poisonous coal tar gases by a workman in a gas works came within the rule. A much closer case is that of in re Donovan, 104 N. E. 431. Here Donovan was employed about two miles from his home. A wagon of his employer's met him ordinarily at the road and took him to work. Also he could ride back in it if he chose. He was injured in the wagon one day returning from work. This seems to be a border-line case, but the court found the Industrial Accident Board was justified in finding that the injury was incidental to Donovan's employment. They decided after reference to Professor Bohlen's admirable article in 25 Har. Law Review, 401, *et seq.*, and the English cases cited by him, that the employer's liability depends upon whether "the conveyance has been provided by him in compliance with the implied or express terms of the contract of employment, for the mere use of the employees, and is one which the employees are required, or as a matter of right are permitted to use." They held this a collateral part of Donovan's contract of employment.

New Jersey.—In New Jersey there have also been a very few cases which are directly in point. In the first (Bryant et al. v. Fissel, 86 Atl. 458, 1913) the facts briefly were these: Bryant, the plaintiff's deceased, was employed as a carpenter on a building in Newark by the defendant. A heavy bar of metal was dropped by another workman, employed by a different contractor, from several stories above, striking Bryant and causing his death. Bryant was, at the time, pursuing his employment, so there was no question that the death arose in the course of his employment. But did it "arise out of" the employment? The Supreme Court held "yes." In defense of this proposition it was said: "For an accident to arise out of and in the course of the employment, it must result from a risk reasonably incidental to the employment." Following the case of Fitzgerald *supra*: "The character or quality of the accident as conveyed by the words 'out of' involves the idea that the accident is in some sense due to the employment. It must be an accident resulting from a risk reasonably incident to the employment."

The case of Zabriskie v. Erie R. Co., another New Jersey case (88 Atl. 824), cites the decision above and bears out the former opinion of the court. Here an employe of the defendant, in crossing its tracks to go to a toilet, was struck by an automobile and then by a train causing his death. It was held that the defendant contemplated, *ex necessatati*, that its workmen would have to

cross the track and the men themselves did likewise.

Reimers v. Proctor Pub. Co., 89 Atl. 931 (N. J. Supp. 1914), holds that a general utility man who was injured in driving an automobile when he had been expressly ordered to leave it alone, did not receive an injury arising out of and in the course of his employment. Newcomb v. Allertson, 89 Atl. 928, is a case in which a chauffeur broke his arm by the back fire of his automobile. Recovery was asked for and granted though the injury complained of was indirect, being ankylosis of the thumb due to an improperly dressed arm.

More interesting is the case where a factory employe quit work at her machine shortly before noon, and was, in accordance with custom, combing particles of wool out of her hair preparatory to going home when her hair was caught in machinery and she was injured. The court gave a liberal construction to the statute in holding her employer liable. It was said by the court: "It would be entirely too narrow a construction to limit the benefit of the statue to the time the employe is actually at his machine. The preparation reasonably necessary for beginning work after the employer's premises are reached and for leaving when the work is over is a part of the employment." This case shows a tendency to liberal construction. (Terlecki v. Strauss, 89 Atl. 1023, 1914.)

Michigan.—The only other jurisdiction in which the author could find reported cases in point was Michigan. But the limited variety of cases is compensated for by the interesting character of those in the books. Probably the most interesting is that of Clem v. Chalmers Motor Co., 144 N. W. 848 (Mich., 1914). Here Clem was working as a carpenter for the defendants in the construction of a low shed. He was on the roof when the foreman called the men down to take "coffee lunch" between nine and ten o'clock in the morning. There was a firmly built ladder by which the other workmen descended, but Clem, seeing a piece of rope lying near asked two men to hold it and started over the edge to the ground on the rope. How the accident happened no one knew but Clem fell and sustained injuries of which he died. The Supreme Court held this accident arose out of and in the course of Clem's employment. I quote: "The getting his luncheon under the conditions shown was just as much a part of his duty as the laying of a board or the spreading of roofing material." (It had been proved before that it was in order to increase the efficiency of the men that the coffee lunch was given.)

A still later decision of the same court holds that a cabinet worker who runs to punch the time clock before luncheon at noon and who collides on the way with a coworker, sustaining injuries that resulted in his death, indirectly had sustained injuries leading to death, arising out of and in the course of his employment. But evidence that the company had a rule against running to the clock was excluded on the ground of acquiescence in the company. Raynor v. Sligh Furniture Co., 146 N. W. 665, 1914.

Thus from the leading American cases in point, though they represent only three jurisdictions, it is seen that our courts exhibit an inclination to follow the English decisions and there is little doubt that the rule is well enough established to be denominated good American law. It is to be earnestly hoped that the courts of the other twenty jurisdictions, many of which are even now facing the question, will not deviate from the line laid down by the Massachusetts, New Jersey, and Michigan courts, for it is of great importance that laws as universal as our Workmen's Compensation Acts should be construed in the various states with some degree of regularity. The laws mean much in rendering less harsh the inevitable results of misadventure in all manual pursuits. From the study of these cases it can be readily seen that the object of the Acts are being carried out: relief for nearly every accident to the employe. To follow the rules laid down above

will be to give substantial justice to the employer and the employed.

BEVERLY H. COINER.

Ithaca, N. Y.

A DUTY OF THE BAR.—SHOULD NOT LAWYERS INFORM LAYMEN CONCERNING THE QUALIFICATIONS OR LACK OF QUALIFICATIONS, OF CANDIDATES FOR THE OFFICE OF TRIAL JUDGE?

Bar Associations of Missouri and other states are trying to devise a plan for the nonpartisan election of trial judges.

Why do the Bar Associations want a nonpartisan judiciary? Why this dissatisfaction with the present court conditions? Why are lawyers forced to admit inefficiency and injustice in the trial court?

As a rule, an incompetent lawyer does not reach the bench of our Appellate Courts, for the reason that there is a closer scrutiny of candidates who aspire to a place on the Appellate Bench, and for the reason that the mere fact that a large number of voters scattered over a rather large area must participate in the selection of an Appellate Judge, has a tendency to eliminate an incompetent lawyer from the contest; and for the further reason that generally incompetent lawyers do not aspire to a place on the Appellate Bench as they know that incompetency would be more readily exposed there than it is on the trial bench. But, can this be truly said of our trial courts? Do the voters, the taxpayers, always select the best man available to act as trial judge? If not, why not? Is it not because the lawyers hesitate to inform the voters and taxpayers with respect to the qualifications, or lack of qualifications, of candidates for the office of trial judge?

Instead of Bar Associations consuming time by trying to devise a plan for a nonpartisan judiciary, they should put in their time giving the voters candid and correct information concerning the qualifications, or lack of qualifications, of the different candidates for judicial positions. Bar Associations and lawyers should help the average voters and taxpayers to choose the best man for trial judge—instead of trying to limit their power of choice.

To illustrate: Sometimes a rather antiquated lawyer takes a notion that he wants to go on the bench "to round out his career"—as he calls it. When an old lawyer goes on the bench, he always *flattens out* whatever career he ever had, for the reason that good judicial service imperatively demands a man in the prime of life, in good health, with a mind in a high state of activity—as every lawyer knows, and as every lawyer should tell the voters without respect to party.

The taxpayers and average voters want the best man available for trial judge, but, they do not always know who is the best man. A good lawyer wants the best judge he can get, just as a good ballplayer wants the best umpire he can get—and the people themselves are somewhat to blame in failing to consider the advice of good lawyers in their selection of trial judges.

Sometimes an abstracter and conveyancer, or an insurance agent, or a loan agent or a real estate agent, or a chronic politician (who has obtained a law license) will decide to become a candidate for Circuit Judge. Then, the lawyers should inform the voters and taxpayers, both by public and private utterance, that a trial lawyer and practical law student is the only capable man for the office of trial judge; that getting votes or receiving votes, does not make a man a trial judge; and that a trial judge must be a law student and a learner after he gets on the Bench.

All these different kinds of agents (as well as automobile and artificial limb agents) are excellent in their place—but, their place is not on the Trial Bench. Sometimes an abstracter and insurance agent does get himself elected to the Trial Bench. Then, the taxpayers suffer a long list of abuses, without fully realizing the cause of the trouble; then, their trial judge prefers

to *guess* at what the law is, rather than have able lawyers make legal arguments before him; your real estate agent or insurance agent (who, for the time being is serving as judge) is afraid the spectators and persons attending court will find out that he is learning from the lawyers. Whereas, a truly capable trial judge is glad to listen to arguments made by capable lawyers, and is glad to consider the authorities cited by them at any time or on any question.

Your abstracter and insurance agent (serving as judge) bosses real lawyers in the court room, trying to make laymen believe that he excels them in knowledge or honesty. Your abstracter and insurance agent (serving as trial judge) wants the cases continued and is willing to make most any kind of a ruling in order to keep from trying a case. Your abstracter and insurance agent (serving as trial judge) favors delay, keeps jurors and witnesses in attendance for an unreasonable length of time, piling up costs to be paid by the taxpayers. Your abstracter and insurance agent (serving as trial judge) decides cases according to the *lawyer* who presents the case, more than he does according to the *law* which governs the case.

An inefficient trial judge is the most expensive officer that taxpayers support. If the lawyers will do their part in educating the people to this truth; and, if the people will do their part in finding out who are the most capable men, then, much of the present dissatisfaction will disappear without a nonpartisan election law.

PLATT HUBBELL.

Trenton, Mo.

STANDING TIMBER—REMOVAL.

BOND v. UNGERECHT, et al.

Supreme Court of Tennessee. June 24, 1914.

167 S. W. 1116.

A deed of standing timber, with provision that the grantee is to be allowed five years, but no longer, to cut and remove it, passes a title to the timber, subject to defeasance as to such of it as is not removed within the time specified; the grantee's title terminating as to timber not then removed.

WILLIAMS, J. The bill of complaint was filed to recover of defendants a number of sawlogs which it is alleged were wrongfully cut on the lands of complainant, Bond.

It is alleged that complainant had conveyed standing timber to the Hatchie Manufacturing Company by deed, dated November 3, 1905, which contained, among others, the following provisions pertinent to this inquiry:

"I, Sallie Bond, for the consideration of $5,500.00, cash, have sold and do hereby transfer and convey unto said Hatchie Manufacturing Company, all of the timber of every kind and description [on tract of land, described.]

"To have and to hold all of said timber, unto said Hatchie Manufacturing Company, and its assigns forever. [Here are inserted covenants of seisin, unincumbrances and general warranty.]

"It is expressly understood and agreed by the parties hereto, that said Hatchie Manufacturing Company, and its assigns, are to be allowed five (5) years, but not longer, from this date, to cut and remove from said land the timber hereinbefore sold and conveyed."

The grantee corporation, shortly after this purchase, itself conveyed the standing timber so that its rights therein were owned by the defendants, Ungerecht and others, long prior to the expiration of the time limit of five years.

The chancellor and the Court of Civil Appeals decreed in favor of complainant, and defendants are before us on petition for writ of certiorari.

(1) The primary contention of defendants is that by the deed the grantee took an absolute and indefeasible title to the timber, so that regardless of the time limit the trees were subject to be cut and removed at will on payment of damages done to the lands of complainant on which the timber or logs were, in any effort to remove the same.

They correctly contend that in no reported case has this court passed on the rights of a grantee under such a deed of conveyance. While this is true, the attitude of the court on the question was foreshadowed in two cases and indicated to be against defendants' insistence. Carson v. Lumber Co., 108 Tenn. (24 Pickle) 681, 69 S. W. 320; Box Co. v. Moore, 114 Tenn. (6 Cates) 596, 87 S. W. 415, 4 Ann. Cas. 1047.

In Carson v. Lumber Co., supra, the nature of the title passing in standing timber under such a conveyance was discussed; but in the contract of sale there involved no time limit had been named for cutting and removing the timber, and the court held that the grantee had by implication a reasonable time for that purpose, and that a reasonable period ot time had not expired, with result that the questions here raised were expressly left open.

In Box Company v. Moore, supra, there was a similar discussion, but the contract was expressly held to be one granting permission or license and not one of conveyance.

The authorities cited and reviewed in those cases need not be recanvassed in this opinion. A large number of decisions on the subject in other jurisdictions have been reported since the dates of those decisions, and, while the lack of harmony in the cases has not passed, the decided trend of the recent authorities is towards the view signified in our two cases referred to, and now by us held to be applicable to the deed in contest.

A typical and leading case relied upon by the defendants is that of C. W. Zimmerman Mfg. Co. v. Dan, 149 Ala. 380, 42 South. 858, 9 L. R. A. (N. S.) 663, 123 Am. St. Rep. 58, in which the deed was almost identical with the one we have under review. It was there held that the deed vested a title in the trees in the grantee, not forfeited by a failure to remove the timber within the time limited; that the provision allowing a period of years within which to cut and remove the timber conveyed is to be treated as a covenant to cut and remove on the part of the grantee, who could still enter and remove the timber at his pleasure, being liable to the grantor for such damages to the freehold as he should cause in so doing; and that the grantor would also have a right of action against the grantee for a breach of the covenant in not removing as agreed. Other recent cases in accord with that view are collected by the annotator in notes to U. S. Coal & Oil Co. v. Harrison, 71 W. Va. 217, 76 S. E. 346, in 47 L. R. A. (N. S.) 871, along with the cases contra.

In our view, in this Alabama Case and other cases cited by the defendants, the contract is construed technically and in a way to lead to results in declared rights that are inequitable and in remedies that are inadequate. The soundness of a construction that gives rise to so many and such remedies on breach of the contract may well be doubted. Some of the courts holding to the doctrine of indefeasible title declare that, although the grantee does not lose his title by failure to remove the timber from the land within the period limited, the court cannot give him authority to enter to remove after expiration of the period. In this view there would be an existing title barren of right to be enforced legally, to be enjoyed only by way of a trespass. Pierce v. Finerty, 76 N. H. 38, 76 Atl. 194, 79 Atl. 23, 29 L. R. A. (N. S.) 547.

The better conception of the rights of the parties appears to us to be that such a deed passes a title to the timber which is subject to defeasance as to such of the timber as is not removed within the time fixed for removal; that the title of the grantee terminates, except as to timber removed, with the termination of the grantee's right of entry. As was well said by Mr. Justice Beard in Carson v. Lumber Co., supra, under the other rule:

"The standing timber may interfere with the use of the soil by its owner, practically oust him from its control and enjoyment, without" a contract in terms "for such extensive rights. The lumber company, claiming under the original grantees, purchased timber and the right to cut and remove it, and not land, and yet upon its contention * * * it has the right to use the soil for sustenance of standing trees, and the land as a depository for the cut, and their removal, forever, if it pleases."

An element that may enter into consideration as inuring to the benefit of the grantor is the clearing of the land for tillage in the contracted removal of timber, and this advantage would be lost to the landowner under the doctrine we discard, if it should please the grantee to leave the timber standing beyond the time limit.

(2) The stipulation allowing five years, but not longer, to cut and remove the timber from the land, was not complied with by a mere cutting. A severance from the soil is not a removal from the premises, and such as has been cut beyond the point of such severance into the form of sawlogs is lost to the grantee if not removed from the land within the allowed period. Box Company v. Moore, supra; Anderson v. Miami Lumber Co., 59 Or. 149, 116 Pac. 1056; Rowan v. Carleton, 100 Miss. 177, 56 South, 329; Hitch Lumber Co. v. Brown, 160 N. C. 281, 75 S. E. 714.

Other questions raised by the assignments of error have been considered, but discussion of same in this opinion is waived. Writ denied.

NOTE.—*Nature of Title in Timber Sold and to be Removed by Purchaser.*—There is a very great abundance of authority in support of the instant case, and, indeed it would appear that the weight of authority preponderates decidedly that way, among which may be cited Hounshell v. Miller, 153 Ky. 530, 155 S. W. 1148; St. Louis Cypress Co. v. Hibodaux, 120 La. 834, 45 So. 742; Noyes v. Goding, 104 Me. 453, 72 Atl. 181; 43 So. 813; Hollensteiner v. Missoula Lumber Co., 37 Mont. 278, 96 Pac. 430; Midgette v. Grubbs, 145 N. C. 307, 58 S. E. 795, 13 L. R. A. (N. S.) 278; Anderson v Miami Lumber Co., 59 Or. 149, 116 Pac. 1056; Hill v. Burton Lumber Co., 90 S. C. 176, 72 S. E. 1085; Belcher v. Kleeb, 59 Wash. 166, 109 Pac. 798; Brown v.

Gray, 68 W. Va. 555, 70 S. E. 276; Bretz v. Connor Co., 140 Wis. 269, 122 N. W. 717; Quigley Fur. Co. v. Rhea, 114 Va. 271, 76 S. E. 330.

And there are cases which hold that though the contract for the sale of standing timber specifies no time for its removal, the title is subject to defeasance where the timber is not removed within a reasonable time. Earl v. Harris, 99 Ark. 112, 137 S. W. 806; Shippen Bros. Lumber Co. v. Gates, 136 Ga. 37, 70 S. E. 672; Ky. Coal, etc., Co. v. Carroll H. Lbr. Co., 154 Ky. 523, 157 S. W. 1109; Eastern Ky. Min. & T. Co. v. Swann-Day Lumber Co., 148 Ky. 82, 146 S. W. 438, 46 L. R. A. (N. S.) 672. But it has been held that before forfeiture may result the land owner should give the timber purchaser notice to remove, and the latter has a reasonable time thereafter to comply. Huron Land Co. v. Davison, 131 Mich. 86, 90 N. W. 1034; James v. Erskine, 155 Mich 606, 119 N. W. 897.

And a few cases have held that if it may be inferred from the terms of the contract that there is no limit placed upon the time for removal, the contract will be enforced. Baker v. Kenny, 145 Iowa 638, 124 N. W. 901, 139 Am. St. Rep. 456; North Georgia Co. v. Bebee, 128 Ga. 563, 57 S. E. 873; Cawthorn v. Stearns Culver Lumber Co., 60 Fla. 313, 53 So. 738; Clapp v. Draper, 4 Mass. 266, 3 Am. Dec. 215.

Or it has been held that mere failure to fix a limit of time for removal serves to vest absolute title in trees. Butterfield Lumber Co. v. Guy, 92 Miss. 361, 46 So. 79, 15 L. R. A. (N. S.) 1123, 131 Am. St. Rep. 540; Wilson Lumber Co. v. Alderman & Sons Co., 80 S. C. 106, 617 S. E. 217, 128 Am. St. Rep. 865; Bardon v. O'Brien, 140 Wis. 191, 120 N. W. 827, 133 Am. St. Rep. 1066. And the same rule has been applied to the case of a reservation by grantor in a deed of conveyance. Hicks v. Phillips, 146 Ky. 305, 142 S. W. 394, 47 L. R. A. (N. S.) 878.

Cases opposed to the instant case hold that time expressed in the contract of sale for removal is a mere covenant whose insertion does not make the contract a mere conditional sale. Peterson v. Gibbs, 147 Cal. 1, 81 Pac. 121, 109 Am St. Rep. 107; Walker v. Johnson, 116 Ill. App. 145; Hoit v. Stratton Mills, 54 N. H. 109, 20 Am. Rep. 119; Bunn v. Valley Lumber Co., 51 Wis. 376, 8 N. W. 232; Zimmerman Mfg. Co. v. Daffin, 149 Ala. 380, 42 So. 858, 9 L. R. A. (N. S.) 663, 123 Am. St. Rep. 58; Gibbs v. Peterson, 163 Cal. 758, 127 Pac. 62; Brown v. Bishop, 105 Me. 272, 74 Atl. 724; Advance, etc., Lumber Co. v. Hornaday, 49 Ind, App. 83, 96 N. E. 784; Fairbanks v. Stowe, 83 Vt. 155, 74 Atl. 1006, 138 Am. St. Rep. 1074; Peirce v. Finnerty, 76 N. H. 38, 76 Atl. 194, 29 L. R. A. (N. S.) 547.

The same rule has been declared as to reservations in deeds by grantors. De Goosh v. Baldwin, 85 Vt. 312, 82 Atl. 182; Western Lime & Cement Co. v. Copper River Land Co., 138 Wis. 404, 120 N. W. 277; Dyer v. Hartshorn, 73 N. H. 509, 63 Atl. 231.

But as has been well said in a Massachusetts case: "It may be difficult in many cases to determine from the terms of the contract whether the parties intend to grant a present estate in the trees, while growing, or only a right either definite or unlimited as to time, to enter and cut, with a title to the property when it becomes a chattel." White v. Foster, 102 Mass. 375. After all this is the cardinal rule that should govern in cases of this kind, rather than to adhere to any technical theory on the subject. C.

ITEMS OF PROFESSIONAL INTEREST.

RECENT DECISIONS OF NEW YORK COUNTY LAWYERS' ASSOCIATION COMMITTEE ON PROFESSIONAL ETHICS.

In answering questions this Committee acts by virtue of the following provisions of the by-laws of the Association, Article XVI, Section III:

"This Committee shall be empowered when consulted to advise inquirers respecting questions of proper professional conduct, reporting its action to the Board of Directors from time to time."

It is understood that this Committee acts on specific questions submitted ex parte, and in its answers bases its opinion on such facts only as are set forth in the question.

QUESTION No. 66.

Is it improper for a lawyer to withhold money from his client and give him credit for it in account under the following circumstances:

The money is derived from a collection made by the attorney for his client as the result of a compromise of a dispute with a debtor; pending the collection the client retained the attorney to sue out an attachment against another debtor of the client for an agreed compensation, larger than the said sum now withheld; the attorney prepared the papers, but the client abandoned the cause, promising, however, to pay the agreed compensation. The client will not hold any further communication with his attorney, despite the attorney's repeated efforts to communicate with him; the attorney has now brought suit against the client to recover the agreed compensation. and his reasonable compensation for the actual collection; he has learned that on a former similar occasion, another attorney, after recovery of a judgment against the same client, and issuing execution, discovered that the client's first name had been removed from the sign on his former place of business, and his wife claimed to own the business; in apparent anticipation of the same device, the client's first name has again disappeared from his place of business, since the institution of the pending suit against him.

Answer No. 66—The inquiry involves questions of law, on which the Committee expresses

no opinion. Assuming that the lawyer has satisfied himself of his legal right to assert a lien or counterclaim, then, in the opinion of the Committee, he may properly withhold the moneys, by reason of the facts set forth. In this case, however, as in general when a lawyer withholds a client's funds, the moneys should not be mingled with the lawyer's own, but should be held in a special account, so that the lawyer will at all times, until the controversy is ended, be in a position to account and pay over, should his client prevail against him.

QUESTION No. 69.

A, an attorney practicing in this city, writes to B, a judgment creditor of C, stating that he has information whereby he can collect a judgment of B against C, and states in the letter that if he succeeds in collecting the judgment, he is to receive as his compensation a sum equal to forty per cent of the amount collected, and if he fails to collect, then no charge is to be made against B. B writes to A, stating that if he is not called upon to bear any part of the expense, that then A may proceed. Without a written answer to the communication last mentioned A proceeds to enforce the collection of this judgment.

May I take the liberty of asking the views of your Committee on this transaction?

Answer No. 69—In the opinion of the Committee the conduct of the attorney is improper in two aspects, namely: that he solicits the employment and impliedly agrees to bear the expenses.

LATIN MAXIMS AND THE DOCTRINE OF ACTIO PERSONALIS.

Doctrines of English law which have become embodied in Latin maxims, are usually obscure doctrines. Probably, this is partly due to the truth expressed jocularly in the well-known epigram attributed to Lord Bowen: "An argument seems respectable when translated into Latin, which in English would seem nonsense." Certainly, it is easier to base an illogical judgment upon a principle clothed in the language of medieval schoolmen than it is to found it on a rule expressed in the language used by the plain man in the street. Now, to this well-known peculiarity of doctrines embodied in maxims, that contained in the words actio personalis moritur cum persona, is assuredly no exception. And it cannot be said that the latest important case in which it has arisen—namely, The Amerika (Times, May 28) —has altogether helped to elucidate it.

The facts out of which The Amerika arose are simple enough. A submarine, the property of the admirality, was sunk off Dover by a foreign liner. Proceedings in the Admiralty Court followed, as the result of which the owners of the liner admitted that she was to blame for the collision, and agreed to pay to the admiralty ninety-five per cent of the damages occasioned to them by that collision. These damages were assessed in the usual way by the assistant registrar and merchants, who disallowed one item in the claim put forward by the Admiralty—namely, a sum of about £5,000, the capitalized amount of pensions and grants paid by the Admiralty to the relatives of certain members of the crew drowned by the collision. These pensions and grants were gratuities; the Admiralty was not legally bound to make them, but had been in the habit of doing so in similar cases, and could not honorably have refused them in the present case. Again, as a matter of fact, these relatives had themselves brought independent actions against the liner under Lord Campbell's Act, and had already recovered damage for the pecuniary loss sustained by them through the death of their protectors. The question was whether or not this item was recoverable by the Admiralty against the owners of the liner as part of the damages.

At first sight the answer to this question seems quite easy. One remembers that actio personalis moritur cum persona. One remembers, too the extension to this maxim given by Lord Ellenborough in the famous leading case of Baker v. Bolton (1 Camp. 493). There the plaintiff's wife had been killed in an accident due to the negligence of the proprietors of a stage-coach in which she was traveling, and the court held that although, if she had lived, her husband could have recovered for the loss of her services due to the defendants' negligence, yet he could not maintain an action for the loss of her services, or of her society, or of the mental sufferings occasioned himself, as the result of her death. "In a civil court," said Lord Ellenborough, "the death of a human being cannot be complained of as an injury; and in this case the damages as to the plaintiff's wife must stop with the period of her existence." The second clause meant this: the plaintiff's wife had survived her injuries for one month, and the loss of services accruing during that month were recoverable by her husband.

This application of the Latin maxim has long been settled law, but text writers of high authority have questioned its correctness. Sir Frederick Pollock advances cogent reasons against it in his Law of Torts (9th edition, pp. 65-66), and even expresses a faint hope that some day the House of Lords, which has never

yet considered the point, may overrule it. But the Court of Appeal has more than once restated and re-affirmed the rule. Lord Ellenborough's desision was given in 1808, and it was not until 1873 that a court of equal authority had to consider the rule in a leading case: Osborn v. Gillett (L. R. 8 Ex. 88). There a father lost his infant daughter as the result of the defendant's negligent driving. He suffered no pecuniary loss as the result of her death, and so could not claim damages as a dependant under Lord Campbell's Act. But he claimed damages for the tort known as Quod servitium amisit, namely, that she was in law his servant and he had lost her services. The defense put in a plea based on actio personalis, and on special demurrer—it was still the days of the old pleading—the Court of Exchequer, by a majority, held the plea to be a sufficient answer to the claim. The majority based their view on Lord Ellenborough's judgment. But Baron Bramwell delivered a strong judgment in favor of allowing the action. Hence Osborn v. Gillett failed to put an end to the controversy.

It was not until the twentieth century, nearly one hundred years after Baker v. Bolton, (supra), that the Court of Appeal at length had to consider this very point. This was in Clark v. London General Omnibus Co. (Limited) (1906, 2 K. B. 648). Here a father had incurred funeral expenses in burying an infant daughter—by implication of law his servant—killed through the defendant's negligence. He claimed to recover these against the defendants, but the Court of Appeal emphatically and unanimously disallowed the claim. They expressly referred to Osborn v. Gillett (supra), and treated it as a settled and indubitable authority. We may add that the court was a strong court, for, in addition to Lord Alverstone, who presided, it contained the late Lord Gorell (then Sir Gorell Barnes, president) and Lord Justice Farwell. It seemed as if the law was clearly decided once for all. And it certainly looks as if the Admiralty claim in The Amerika was in breach of the principle laid down.

But three years after Clark v. London General Omnibus Co. had been decided, another case came before a different Court of Appeal (Lord Justice Farwell was the only member common to both courts), and was decided in such a was as to throw doubts on the precise scope of the rule that seemed so emphatically laid down. In Jackson v. Watson & Sons (1909, 2 K. B. 193) the plaintiff sued the defendants who had sold him in breach of warranty poisoned salmon, which resulted in the death of his wife; he claimed, as part of the damages he had suffered for the breach of warranty, compensation for the loss of his wife's services. He was held entitled to recover, on the ground that his action was framed in contract and not in tort. He was not "complaining in a civil court of the death of a human being as an injury." He was merely claiming damages for a breach of contract; and the particular damages in question was a part of the damages suffered, and this the court held not to be too remote.

Now, of course, it is easy superficially to reconcile Jackson's case with Clark's case and the older authorities. But it is scarcely satisfactory in principle to say, as the text-books, since the latter case, have been saying (e. g., Salmond, at p. 378), that the rule is different according as the injury complained of is a tort or a breach of contract. Such a distinction is illogical, and founded on no well-accepted general principle; it certainly is inconsistent with the view that the rule is based on "public policy." The judges felt this difficulty in Jackson's case, and they did not rely solely on the distinction between tort and contract. "On the whole," said Lord Justice Vaughan Williams (at p. 202), "I have come to the conclusion that this exception from the general principles on which damages are based only applies to cases where the cause of action is the wrong which caused the death, and does not apply to cases where there is a cause of action independently of such wrong." This is a more logical rule, but it leaves it open to argue that where two torts have been committed, one injuring property and the other causing your servant's death, you can recover damages for the latter in your action for negligence in respect to the former.

The attorney-general adopted this way of explaining the principle, and argued for it with great force in The Amerika (supra). There the defendants had sunk the Admiralty's submarine by their negligence, and so had occasioned to the Admiralty "a wrong" independent of the death of a human being. When once that independent cause of action is established and damages in respect of it have been claimable, why not include—as in Jackson's case—damages for the loss of one's servants, a direct and immediate result of the collision? It seems hard to answer this argument and to distinguish the case from Jackson's case. The injury to the submarine seems as independent a cause of action as the breach of warranty, although each resulted also in the death of one's servant. But the Court of Appeal refused to accept this subtlety, and definitely de-

cided that the exception established in Jackson's case only exists where the independent cause of action is founded on a breach of contract. They therefore held that the Admiralty could not include in its damages a claim in respect of the deceased crew.

Limits of space prevent us dealing with two other fascinating legal problems that arise out of The Amerika, but which the court did not find it necessary definitely to decide. Even if a claim for loss occasioned to the Admiralty by the homicide of its sailors had been sustainable, could the damages recovered have included gratuities voluntarily paid to these seamen? It would seem that payments of this kind are not a necessary part of the loss, and so are too remote. Again, even if the damage is not too remote, could the defendants be made to pay twice over, for they had already been ordered to pay the relatives of these sailors damages in their action under Lord Campbell's Act. Both of these points are interesting, and are worthy of further discussion on some future occasion.—London Solicitors' Journal.

BAR ASSOCIATION MEETINGS FOR 1914—WHEN AND WHERE TO BE HELD.

American Bar Association—Washington, D. C., October 20, 21 and 22.
California—Oakland, November 19, 20 and 21.
Connecticut—Informal meeting at Griswold, in August.
Minnesota—St. Paul, August 20, 21 and 22.
Missouri—St. Louis, latter part of September.
Montana—Billings, August 13, 14 and 15.
New Mexico—August 18.
North Dakota—Grand Forks, September 15.
Oregon—Portland, November 17 and 18.
Utah—August 15.
Vermont—Montpelier, October 6.
Washington—Wenatchee, August 5 and 6.
West Virginia—Parkersburg, December 29 and 30.

CORRESPONDENCE.

INCONSISTENT VERDICT IN ACTION AGAINST MASTER AND SERVANT.

Editor Central Law Journal:

I have been very much interested in your article in a recent edition of the Central Law Journal, entitled "Inconsistent Verdict in an Action Against a Master and a Servant, or a Corporation and its Agent," because of a case which I recently tried in this district wherein we brought suit against a railroad company and the superintendent of a lathe, whom we alleged was the vice principal. The negligence complained of consisted in a negligent order given by the superintendent to the other helpers which resulted in the plaintiff, who was also a helper, being seriously injured. The verdict of the jury was against the railroad company but was silent as to the vice principal.

You will perhaps be interested in knowing that the Supreme Court of Montana in three cases has directly passed upon this question, the cases being as follows:

Verlinda v. Stone-Webster Eng. Co., 44 Mont. 223, 119 Pac. 573.

Melzner v. Raven Cooper Co., 47 Mont. 251, 132 Pac. 552.

DeSandro v. Missoula L. & W. Co., 48 Mont. 226.

Very truly yours,

Miles City, Mont. C. H. Loud.

NOTE.—We add to the collection of cases that of Dunshee v. Standard Oil Co., 146 N. W. 830, decided by Supreme Court of Iowa, where it was held that if appellant fails to raise the question in the trial court he is foreclosed. This would seem to show that White v. Text Book Co., 150 Iowa 27, 129 N. W. 338, which was discussed in the article referred to, does no more than regard the verdict as irregular. The Verlinda case referred by our correspondent seems somewhat on the line of Ill. Cent. R. Co. v. Clarke, 85 Miss. 691, 38 So. 97, in holding that the servant should not be denied recovery against the master merely because the jury cannot agree on a verdict against the other servant, or even if they arbitrarily disregarded the evidence of his negligence. The Melzner case goes on two grounds, one that the point was not saved, as in the Dunshee case, and the other that a failure to find at all as to liability of the co-employe, does not invalidate the verdict against the employer. This comes quite nearly to saying if there had been a finding in favor of the co-employe it would not invalidate a finding against the employer, for it is as reasonable to claim incompleteness in verdict as invalidity in verdict.

We think the Mississippi court strikes the keynote in holding that employer's liability is not added to in any way, because he still can sue the employe for contribution, a verdict in the latter's favor against plaintiff binding in no way the co-defendant.—EDITOR.

HUMOR OF THE LAW.

A Yankee attorney was addressing a jury on behalf of a prisoner.

"Gentlemen," he said, "witnesses have sworn that they saw the accused fire his gun; they have sworn they saw the flash and heard the report; they have sworn they saw Pete Jackson fall flat; they have sworn that this bullet was extracted from Pete Jackson's body but gentlemen, in the name of justice, I ask you where is the evidence that the bullet hit Pete Jackson?"—New York Globe.

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

1. **Adverse Possession**—Color of Title.—A married woman's deed, in which her husband does not join, purporting to convey her sole and separate estate, though void, gives the grantee color of title sufficient to form the basis for acquisition of title by adverse possession.—Calvert v. Murphy, W. Va., 81 S. E. 403.

2. **Bankruptcy**—Courts.—Where a trustee in bankruptcy intervened in a foreclosure proceeding pending in a state court, he thereby recognizes the jurisdiction of that court.—O'Reilly v. Pietri, La., 64 So. 922.

3.——Preference.—Whether a mortgage executed by a bankrupt constitutes a voidable preference is mainly, if not entirely, a question of law.—Sheppard-Strassheim Co. v. Black, U. S. C. C. A., 211 Fed. 643.

4.——Preference.—Bankrupt's insolvency and transferee's reasonable cause to believe that a preference would result must be proved as facts.—In re Chicago Car Equipment Co., U. S. C. C. A., 211 Fed. 638.

5. **Banks and Banking**—Collection.—A bank receiving a draft for collection was not liable for the negligence of the bank to which it sent the draft in delivering the attached bill of lading without receiving payment, and hence had no right of action against such other bank for its negligence.—Commercial Nat. Bank v. First Nat. Bank, Ky., 165 S. W. 398.

6.——Depositor.—A national bank cannot receive money equitable belonging to another without accounting for the same, even though it was received as an incident of a contract made by the bank, which was ultra vires and not enforceable.—Equitable Trust Co. of New York v. National Bank of Commerce of St. Louis, U. S. D. C., 211 Fed. 688.

7. **Bills and Notes**—Bona Fide Purchaser.—Where S., having contracted to sell land to defendants, sold the land to plaintiff, who reconveyed the same to S. to enable him to fulfill his contract on his transfer of the purchase-money notes to plaintiff, plaintiff was not a bona fide purchaser of the notes.—Ruth v. Cobe, Tex., 165 S. W. 530.

8.——Fraud.—That the maker of a note, a business man, signed it without reading it, believing it to be a receipt, and though the payee characterized it as a receipt, was not sufficient to show fraud.—O'Shea v. Lehr, Mo., 165 S. W. 837.

9.——Notice of Protest.—Notice of dishonor of a note, addressed to the place of plaintiff's residence, where defendant never had resided, and sent there merely because plaintiff had deposited the note in a bank at that point for collection was a nullity.—Silver v. Loucheim, 147 N. Y. Supp. 29.

10. **Carriers of Live Stock**—Waiver.—Where defendant carrier had notice of plaintiff's claim for damages to cattle, and, through its agent, conferred with plaintiff with reference thereto, a provision in the shipping contract for a written notice within 91 days was waived.—St. Louis, S. F. & T. Ry. Co. v. Wall, Tex., 165 S. W. 527.

11. **Carriers of Passengers**—Assault of Conductor.—A passenger is not justified in assaulting the conductor, though the passenger was provoked by the conductor's insulting language.—Louisville Ry. Co. v. Frick, Ky., 165 S. W. 649.

12.——Burden of Proof.—The burden is on a passenger to show that personal effects taken by the passenger into the coach and not checked as baggage were lost by the carrier's negligence.—Missouri, K. & T. Ry. Co. v. Kirkpatrick, Tex., 165 S. W. 500.

13.——False Representations.—Where a carrier's ticket agent sold plaintiffs certain mileage books on representation that they might be used over a specified route, which was untrue, and plaintiffs were damaged thereby, the carrier was liable for the damages, though the plaintiffs by examination of the book and tariffs might have ascertained the contrary.—Driggs v. Southern Ry. Co., Carolina Division, S. C., 81 S. E. 431.

14. **Charities**—Invalid Device.—A clause in a will, which directs the executor to dispose of the residuary estate according to his judgment for goods and charitable purposes, is invalid for failing to point out the purpose.—Gerick's Ex'r v. Gerick, Ky., 165 S. W. 695.

15. **Conspiracy — Exemplary Damages.—In** an action for damages from a conspiracy or common unlawful purpose, held, that the rule that exemplary damages cannot be recoverable, if any defendant is guiltless of malice, is inapplicable, and an instruction based thereon was properly refused, where the case was tried on the theory that the damages resulted from a conspiracy, or that some defendants committed unlawful acts resulting in injury.—Dunshee v. Standard Oil Co., Iowa, 146 N. W. 830.

16. **Contempt**—Good Faith.—In civil contempt proceedings for violating an injunction order, it was no defense that defendant acted in good faith and that no damages resulted to plaintiff, though such matters could be considered in the imposition of sentence.—Red River Valley Brick Corporation v. City of Grand Forks, N. D., 146 N. W. 876.

17. **Contracts** — Corporations.—That certain stockholders may believe that a contract made by the corporation within the scope of its chartered powers is unwise, is not ground for setting same aside.—Holmes v. St. Joseph Lead Co., 147 N. Y. Supp. 104.

18.——Demand for Performance.—Where a contract provided that plaintiff should demand performance by defendant, a demand by letter, written to defendant, sent by mail, and to which no answer was received, was not a sufficient demand to put defendant in default.—Seeley v. Osborne, 147 N. Y. Supp. 116.

19. **Corporations** — Foreign Corporation.—Where a nonresident corporation contracted with a resident to sell and deliver f. o. b. at a point outside the state certain proprietary medicines to be shipped into the state and resold at retail, it was not thereby "transacting business" in the state, and did not incur the penalty prescribed by section 1338.—Dr. Koch Vegetable Tea Co. v. Shumann, Okla., 139 Pac. 1133.

20.——Innocent Purchaser.—Where the owner of a corporate stock executes a power of attorney in blank on the back of the stock certificate without condition and delivers same for sale to a broker, who fraudulently pledges it for loans, the innocent pledgee takes the stock divested of all claims on the part of the person defrauded.—Colonial Trust Co. v. Central Trust Co., Pa., 90 Atl. 189.

21.——Respondeat Superior.—A corporation can be held liable for a malicious act only by imputing to it the wrong of its agent, and, if the agent did not act maliciously, there is no malice to impute to the corporation.—Dunshee v. Standard Oil Co., Iowa, 146 N. W. 830.

22. **Criminal Evidence** — Circumstantial.—Though circumstantial evidence alone is sometimes looked upon with suspicion, where all the links are supplied in the chain of circumstances, it is sufficient to justify a conviction.—Dorsey v. Commonwealth, Ky., 165 S. W. 405.

23. **Criminal Law**—Accomplice.—That a witness was jointly indicted with defendant and entered a plea of guilty does not of itself make him an accomplice with defendant, so as to affect the weight of his testimony.—Powell v. State, Ga., 81 S. E. 396.

24.——Mistrial.—On trials for misdemeanors and felonies less than capital, it is within the discretion of the trial judge to direct that a juror be withdrawn and to order a mistrial when in his opinion necessary to the ends of justice.—State v. Andrews, N. C., 81 S. E. 416.

25.——Waiver.—Proceeding to trial without objection to the failure of the clerk or county attorney to read the indictment or state defendant's plea after the jury were sworn, as required by Rev. Laws 1910, § 5870, was waived.—White v. State, Okla., 139 Pac. 1154.

26. **Damages**—Fright.—In an action for injuries to a female passenger from an unusual jar of the train, where the jury were warranted in finding that the miscarriage of the plaintiff was caused by internal injury, coupled with a nervous shock, the rule forbidding recovery for fright does not prevent a recovery for the miscarriage.—Bell v. New York, N. H. & H. R. Co., Mass., 104 N. E. 963.

27.——Penalty.—Where the damages arising on a breach of contract are uncertain and difficult of ascertainment, a stipulation for the payment of a designated sum as liquidated damages, if reasonable, will be sustained, and whether such damages are difficult of ascertainment is to be determined from the status of the parties when the contract was entered into, and not when it was broken.—Kimbro v. Wells, Ark., 165 S. W. 645.

28. **Death**—Right of Action.—Under the federal Employers' Liability Act, action for death of an employe from injury received while engaged in interstate commerce, maintainable only by the personal representative of deceased, must be by his administrator or executor, though he left no estate, and cannot be by relatives in their individual capacity.—St. Louis Southwestern Ry. Co. v. Brothers, Tex., 165 S. W. 488.

29.——Suffering by Intestate.—In an administrator's action for damages for suffering endured by intestate before his death, the burden was on plaintiff to show such suffering.—Chicago, R. I. & P. Ry. Co. v. White, Ark., 165 S. W. 627.

30. **Deeds**—Equitable Title.—A purchaser of land, who receives a conveyance from one who had only an agreement from the holder of the legal title to convey the property, acquires only an equitable interest.—Dedeaux v. Cuevas, Miss., 64 So. 844.

31. **Divorce**—Custody of Child.—Where a divorce decree awarded the custody of a child to the mother without making provision as to its maintenance and the mother advanced her money for its support, she could sue the father therefor and was not limited to a motion to modify the decree.—Bennett v. Robinson, Mo., 165 S. W. 856.

32. **Divorce**—Desertion.—Refusal of a wife to maintain marital relations with her husband is not an indignity, but is only an element of desertion.—Gruner v. Gruner, Mo., 165 S. W. 865.

33. **Ejectment** — Constructive Possession.—Constructive possession is presumed, in a possessory action, to be in plaintiff, where he shows title to the land from the government.—Scott v. Ramseier, Colo., 139 Pac. 1121.

34. **Embezzlement** — Defined.—Embezzlement is the fraudulent appropriation of another's property by a person to whom it has been intrusted, or into whose hands it has lawfully come, differing from larceny in the fact that the original taking was lawful, or with the consent of the owner.—Spiegel v. Levine, 147 N. Y. Supp. 78.

35. **Equity**—Diversity of Citizenship.—Where diverse citizenship exists between the parties, and the requisite amount is involved to give a federal court jurisdiction, a cause of action for infringement of a trade-mark and one for unfair competition may be joined in one suit.—Samson Cordage Works v. Puritan Cordage Mills, U. S. C. C. A., 211 Fed. 603.

36. **Estoppel**—Definition.—One who, by his conduct, intimates that he consents to an act or will offer no opposition thereto, and so induces others to do that from which they otherwise might have abstained, cannot thereafter question the legality of such act.—Divide Canal & Reservoir Co. v. Tenney, Colo., 139 Pac. 1110.

37.——Easement.—Where a person having the right of way over an alley, knowingly acquiesces while another builds a theater with openings on the alley and paves the alley and uses it for laying pipes, he will be estopped from asserting any prior right acquired by deed to exclude

the other from the use of the alley.—Smith v. Rowland, Pa., 90 Atl. 183.

38. **Evidence**—Latent Ambiguity.—A written contract must be complete on its face, free of ambiguity, and not contradictory of itself, to make inadmissible parol evidence of a term of the contract.—Pittsburgh Steel Co. v. Cottengin, Mo., 165 S. W. 391.

39. **Execution**—Writ of Assistance.—A writ of assistance should not be issued to put in possession a purchaser at an ordinary execution sale under a general judgment.—Lundstrom v. Branson, Kan., 139 Pac. 1172.

40. **Frauds, Statute of**—Assignment of Policy.—Agreement by grantor, contemporaneous with conveyance, to procure consent of insurer to assignment of policy on building held not within the statute of frauds.—Matthews v. McGuffin, Mo., 165 S. W. 874.

41.——Part Payment.—In the absence of a showing that a check was given to the seller under an agreement that it should constitute part payment of the price rather than the means of payment, the check, payment thereon being stopped, was not such a part payment as to take the sale out of the statute of frauds.—Hessberg v. Welsh, 147 N. Y. Supp. 44.

42.——Standing Timber.—Construction of a skid road at a cost of $193.93, and the commencement of the cutting of timber from defendant's land, held to constitute sufficient part performance to take the parol contract for the sale of the timber out of the statute of frauds.—J. P. Miller & Sons v. Hanberg, Wash., 139 Pac. 1085.

43.——Standing Timber.—A verbal contract for the sale of growing timber which allowed the buyers four years within which to remove the timber is not void, under the statute of frauds as an agreement not to be performed within a year.—Groce v. West Lumber Co., Tex., 165 S. W. 519.

44. **Gifts**—Inter Vivos.—In order to constitute a gift inter vivos, there must be, on the part of the donor, an intent to give, and the delivery of the thing given, to or for the donee, in pursuance of such intent, and, on the part of the donee, acceptance.—In re Babcock's Estate, 147 N. Y. Supp. 168.

45. **Highways**—Obstruction.—Where the accident in which plaintiff's automobile was damaged was caused by running over a small stone in a highway, which caused plaintiff to lose control of his machine, so that it crashed into stone piles placed on the side of the road by defendant in repairing the highway, held, that any negligence in placing the stone piles where they were, or in not sufficiently lighting them was not the proximate cause of plaintiff's damage.—Zorn v. City of New York, 147 N. Y. Supp. 70.

46. **Homestead** — Abandonment.—Where a widow, who had a homestead in the lands of her first husband, remarried and removed to the residence of her new spouse, which he had for many years maintained, there was an abandonment of her homestead, notwithstanding the widow and her second spouse after suit by the children for partition, returned to the homestead and took up their abode thereon.—Boggess v. Johnston, Ky., 165 S. W. 413.

47.——Purchase Money.—Neither a vendee nor his grantee can acquire homestead rights as against a vendor's lien reserved in a note given by the purchaser.—Wood v. Smith, Tex., 165 S. W. 471.

48.——Waiver.—The right to claim a homestead exemption may be waived for the benefit of a particular creditor or a particular debt, and the waiver may be limited in its application to future debts only.—Oxford v. Colvin, La., 64 So. 919.

49. **Homicide**—Apparent Danger.—One believing upon reasonable grounds that he is in danger of death or great bodily harm, and having no other apparent means of protecting himself, held entitled to kill, though the appearances are false and he is in fact not in danger.—Sizemore v. Commonwealth, Ky., 165 S. W. 669.

50.——Deadly Weapon.—The specific intent to kill, essential to constitute an assault with intent to murder, is not conclusively shown by the use of a weapon likely to produce death.—Lewis v. State, Ga., 81 S. E. 378.

51.——Dying Declarations.—Dying declarations by deceased are not admissible, where they clearly show that he was actuated by malice and desired accused to be punished.—Reeves v. State, Miss., 64 So. 836.

52.——Malice.—Where, though no ill feeling toward person against whom accused ran automobile was shown, no explanation of his conduct was apparent, unless he was actuated by a reckless disregard of human life, held that malice might be presumed, and the case was properly submitted to the jury.—Dennard v. State, Ga., 81 S. E. 378.

53. **Husband and Wife**—Divorce.—Where a bank made a loan to the husband, secured by an assignment from him of a lien decreed to him in a divorce suit on land in his wife's name, and the loan was paid in part, and the bank failed to secure itself by recourse to the husband's property, and the divorce decree was set aside for insanity of the wife, held that so much of the judgment setting aside the divorce decree as preserved the bank's lien was inequitable.—Page v. Pierce, Kan., 139 Pac. 1173.

54.——Necessaries.—At common law a husband is liable to a third person for necessaries furnished to his wife, when the husband has neglected to supply her with reasonable support.—Dorrance v. Dorrance, Mo., 165 S. W. 783.

55. **Indemnity**—Abutting Owner.—One injured by an obstruction on a sidewalk placed there during the construction of a building on the abutting property may recover either from the city or from the abutting owner; but the city has a right of recovery over against the abutting owner, this being not a right of contribution but indemnity.—City of Louisville v. Nicholls, Ky., 165 S. W. 660.

56.——Wholesaler and Retailer.—Where a manufacturer sold oil which did not comply with the test prescribed by Code, § 2508, a retailer, against whom a judgment was recovered for damages resulting from an explosion of part of the oil sold, may recover against the manufacturer, despite his own negligence in failing to properly inspect the oil after warning.—Pfarr v. Standard Oil Co., Iowa, 146 N. W. 851.

57. **Injunction**—Damages.—Where remedy by injunction has been abused, damages will be allowed on dissolution of the writ, as in cases of wrongful suing out of other conservatory writs, and are not restricted to counsel fees and costs, but include pecuniary loss.—Rees v. Sheridan, La., 64 So. 923.

58.——Irreparable Damage.—Injunction lies to restrain the enforcement of a municipal ordinance invalid as against a foreign corporation and its sales agent as interfering with interstate commerce, and thereby prevent irreparable damage by a multiplicity of prosecutions of the sales agent.—Jewel Tea Co. v. City of Carthage, Mo., 165 S. W. 743.

59. **Insurance** — Assignment.—A contingent interest, such as an assured's right to the cash surrender value of a life insurance policy after 20 years from its execution, could be assigned before such 20 years had expired.—Cornell v. Mutual Life Ins Co. of New York, Mo., 165 S. W. 858.

60.——Exceptions.—The language of exceptions, warranties, and conditions in insurance policies must be clear, and any doubt in the meaning thereof will be resolved against the insurer.—Farmers' Mut. Equity Ins. Society v. Smith, Ky., 165 S. W. 675.

61. **Judgment**—Parol Evidence.—Where a former judgment is pleaded in estoppel, parol evidence, not contradicting the record, is admissible to show the facts upon which it was based.—Chambers v. Land Credit Trust Co., Kan., 139 Pac. 1178.

62. **Landlord and Tenant**—Invitee.—Where a tenant occupies a portion of a building, with the right to use a general elevator, and one performing a casual service for the tenant is injured, by a defect therein, while using it, such person is an invitee, and not a servant of the tenant, who was bound only to exercise of ordinary care.—Smith v. Lederer, Wis., 146 N. W. 888.

63.——Tenancy Month to Month.—A notice given by a landlord to its tenants more than 30

days prior to the expiration of a tenancy from year to year, that on such expiration they would be considered tenants from month to month at an increased rent, followed by payment of the increased rent, created a tenancy from month to month.—Pabst Brewing Co. v. Milwaukee Lithographing Co., Wis., 146 N. W. 879.

64. **Marriage**—Illicit Relation.—A relationship illicit in its inception is presumed to continue as such and does not give rise to a presumption of a common-law marriage.—Spencer v. Spencer, 147 N. Y. Supp. 111.

65. **Master and Servant**—Employment.—An oral contract of employment was not invalidated by the fact that a written contract was contemplated but was never executed.—Gale v. J. Kennard & Sons Carpet Co., Mo., 165 S. W. 842.

66.——Foreign Jurisdiction.—In an employe's action for injuries sustained in a foreign jurisdiction, the law of the place where the injuries occurred, not the law of the forum applies.—Clark v. Best Mfg. Co., Pa., 90 Atl. 186.

67.——Inspection.—It is the duty of a master to carefully inspect its machinery at regular intervals, and, if the master fails to make such inspection, he is chargeable with knowledge of whatever defects it would have revealed.—Cozzins v. Tomlinson Chair Mfg. Co., N. C., 81 S. E. 407.

68.——Negligence.—An employe, who put his hand on gears connecting revolving shafts, without thinking at all whether there was danger of getting hurt, was negligent, whether or not he had observed the gears after the casing was removed shortly before.—Henry v. Providence Gas Burner Co., R. I., 90 Atl. 168.

69.——Warning.—The master's duty to warn and instruct a servant cannot be delegated.—Alpha Portland Cement Co. v. Curzi, U. S. C. C. A., 211 Fed. 580.

70.——Workmen's Compensation.—The cause of action given to an employer against the third person, by whose negligence an employe is injured, by the Workmen's Compensation Law, is assignable by the employer, and his assignee may sue thereon in his own name.—McGarvey v. Independent Oil & Grease Co., Wis., 146 N. W. 895.

71. **Negligence**—Defense.—In an action for injuries from the negligent manner in which an act was done, it is no defense that the act was lawful in itself, or done in the exercise of a lawful right.—Crecelius v. Atchison, T. & S. F. Ry. Co., Kan., 139 Pac. 1194.

72.——Emergency.—A person through whose negligence another is placed in a position where he must adopt a perilous alternative or in a situation of apparent sudden or imminent danger is responsible for the consequences.—Carter v. Walker, Tex., 165 S. W. 483.

73. **Nuisance**—Lawful Business.—A lawful business may be conducted so as to become a nuisance, in which case one injured thereby may enjoin the continuance of the business in such a way.—Block v. Fertitta, Tex., 165 S. W. 504.

74. **Payment**—Duress.—The doctrine that money paid under duress may be recovered is equitable on the theory that it would be against conscience for money or property so obtained to be withheld.—Link v. Aiple-Hemmelmann Real Estate Co., Mo., 165 S. W. 832.

75. **Principal and Agent**—Declaration of Agent.—A statement of a person that he is the agent of another is competent as a circumstance in connection with other evidence to prove agency.—Watkins v. Atlantic Coast Line R. Co., S. C., 81 S. E. 426.

76. **Sales**—Action.—A contract for the purchase of a horse for a specified price, which provides that the amount shall be represented by "joint and severable notes," one-half due in one year and the balance in two years, does not support an action against a buyer before the expiration of a year, where the buyer has not repudiated the contract.—Lawson v. Muse, Mo., 165 S. W. 396.

77.——Delivery.—Delivery of goods sold to the carrier pursuant to the contract of sale is delivery to the purchaser so as to pass title.—Capitol Wood Co. v. Mode & Clayton, Ark., 165 S. W. 637.

78.——Implied Warranty.—To recover under an implied warranty on the ground that seed corn was unfit for the purpose for which it was sold, there should be substantial evidence that it was not fit for seed, and a mere complaint by those to whom plaintiff sold seed corn purchased from defendant will not establish a breach of warranty.—Natchez Drug Co. v. Ratekin Seed House, Iowa, 146 N. W. 865.

79. **Set-Off and Counterclaim** — Pleading.—Damages for fraud and deceit may either be pleaded as a defense to the main suit, or interposed as a counterclaim, or reserved for a future independent action.—Secor v. Silver, Iowa, 146 N. W. 845.

80. **Specific Performance**—Action for.—A contract to convey real estate may be specifically enforced at the suit of the purchaser, though, subsequent to the contract, he obtained an outstanding title.—Groves v. Whittenberg, Tex., 165 S. W. 889.

81. **Subscriptions** — Consideration.—A subscription to an endowment fund of a church conference evidenced by a note of intestate, used to induce others to subscribe, etc., held based on sufficient consideration.—Board of Trustees of Upper Iowa Conference of Methodist Episcopal Church v. Noyes, Iowa, 146 N. W. 848.

82. **Trusts**—Equitable Relief.—A parol trust in lands may be established by the evidence of one witness, if it is such as to satisfy the conscience of the court that equitable relief should be administered.—Ellerd v. Ellison, Tex., 165 S. W. 876.

83. —Estoppel.—Where a declaration of trust is once made, it cannot be revoked, and the declarant is estopped to deny that he holds the property, except on the terms and conditions therein stated.—Drovers' Deposit Nat. Bank of Chicago v. Newgass, 147 N. Y. Supp. 4.

84. **Vendor and Purchaser**—Equities.—The first grantee of the holder of the equitable title to land is entitled to prevail against the subsequent grantee, under the maxim that where the equities are equal the first in time prevails.—Dedeaux v. Cuevas, Miss., 64 So. 844.

85. **Waters and Water Courses**—Estoppel.—Where defendant and her grantors, not only knew of the maintenance of highway ditches and a culvert across the highway, but actively participated in the scheme for taking the water from their land by means of the ditches which discharged the same across the land, defendant could not deny the existence of an easement under Code, § 3004.—Hayes v. Oyer, Iowa, 146 N. W. 857.

86. **Wills**—Attorney's Fees—Attorney's fees in a will contest are primarily chargeable against the executor or other persons employing the attorneys, and are not debts of the estate.—In re Smith's Estate, Iowa, 146 N. W. 836.

87.——Contingent Remainder.—Where land was devised to a person for life with remainder to her bodily heirs, the remainders were contingent and not descendible, and therefore vested in the sole surviving child of the life tenant living at the time of her death.—Hauser v. Murray, Mo., 165 S. W. 376.

88.——Construction.—The intention of a testator is to be ascertained from the whole will and from all that it discloses regarding the nature and extent of the estate, the size of his bounties, the relationship and environment of the beneficiaries, as well as from the precise language over which doubts have arisen.—Bryant v. Plummer, Me., 90 Atl. 171.

89.——Testamentary Capacity.—Mental unsoundness may exist, rendering a man incompetent to make a will, though to all outward appearances he seems to be sane to nonexperts with whom he comes in casual contact.—Philpott v. Jones, Iowa, 146 N. W. 859.

90. **Witnesses**—Privilege.—Where a party employed an attorney to assist him in purchasing land, and directed him to write to the owner making him an offer for the land, such letter was admissible, in a subsequent action of ejectment, since communications made by a client with the intention that they be imparted to a third party do not fall within the rule of privileged communications.—Vittitow v. Burnett, Ark., 165 S. W. 625.